

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

77-1162

**United States Court of Appeals
For the Second Circuit**

B
P/S

UNITED STATES OF AMERICA,

Appellee,

v.

ANTHONY CATINO, THERESA PEDUTO,
MARY MARICCIO, and JERRY DE FEO,
Appellants-Indemnitors,

-and-

ALFRED CATINO,

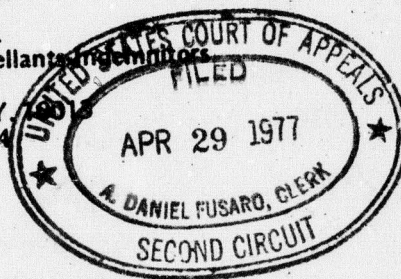
Defendant.

On Appeal from the United States District
Court For the Southern District of New York

APPELLANTS-INDEMNITORS' BRIEF

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TABLE OF CONTENTS

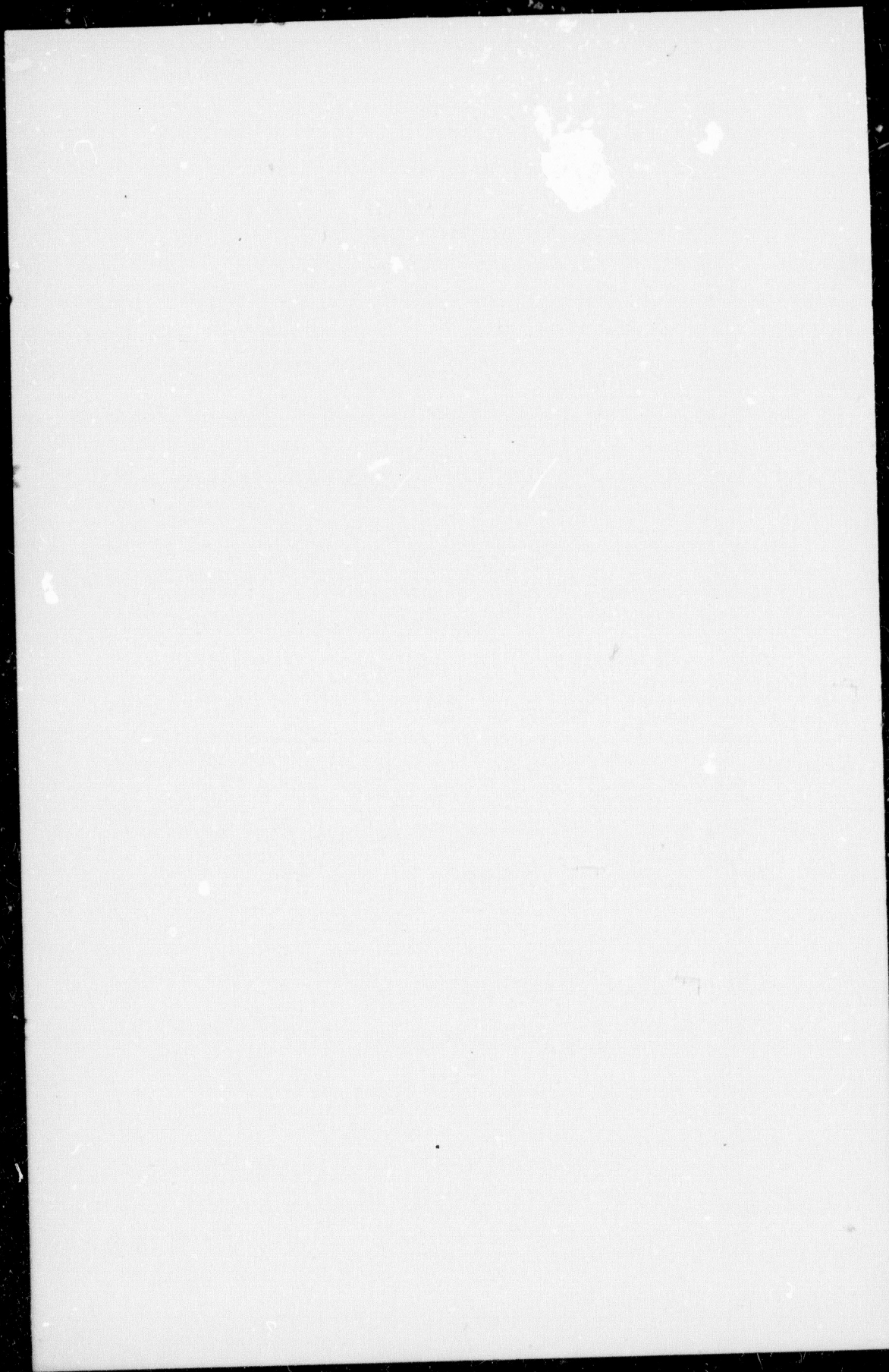
	<i>Page</i>
Statement of Issues	1
Preliminary Statement	2
Statement of Facts	2
ARGUMENT	
POINT I — The Continuing of the District Court Bond Through the Appellate Process Without the Consent of the Surety Constituted a Material Modification of the Surety Contract and Exonerated the Surety's Obligation	3
POINT II — The Failure of the District Court to Accept the Surety's Offer of Proof as to the Practice in the District Was Error	10
POINT III — Pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, Appellants Incorporate and Adopt all Applicable Arguments Raised by Co- Appellant	12
Conclusion	12
CASES CITED:	
<i>Becker v. Faber</i> , 280 N.Y. 146 (1939)	9
<i>Container Transport International Inc. v. United States</i> , 437 F.2d 1365, 1370 (Ct. of Claims, 1971) .	6

<i>Gamble v. Cuneo</i> , 21 App. Div. 413 (1st Dept. 1897) aff'd 162 NY 634	9
<i>Martin v. Victor Co. Inc.</i> , 498 F.2d 16, 23 (1st Cir. 1974)	6
<i>Northwestern Industrial Piping, Inc.</i> , 467 F.2d 1308, 1312 (Ct. of Claims 1972)	6
<i>Palermo v. United States</i> , 61 F.2d 138, 140 (8th Cir. 1932) cert. den. 288 U.S. 600 (1933)	5
<i>Pan American Realty Trust v. Twenty One Kings Inc.</i> , 408 F.2d 937, 939 (3rd Cir. 1969)	6
<i>People v. Bowles</i> , 280 App. Div. 476 (4th Dept. 1952) .	9
<i>People v. Henry</i> , 33 A.D. 2d 1031 (2d Dept. 1970)	9
<i>People v. Public Service Mutual Insurance Co.</i> , 39 Misc. 2d 488 (Sup. Ct. Kings Co. 1963)	9
<i>People v. Public Service Mutual Insurance Co.</i> , 40 Misc. 2d 341 (Sup. Ct. Kings Co. 1963)	9
<i>People v. Public Service Mutual Insurance Co.</i> , 49 Misc. 2d 875 (Sup. Ct. Part I, Spec. Ref. 1966) ...	9
<i>People v. Wirtshafter</i> , 305 N.Y. 515, 522 (1953)	9
<i>People v. Zager</i> , 57 N.Y.S. 2d 881, 884 (Sup. Ct. Kings Co. 1945)	9
<i>Reese v. United States</i> , 76 U.S. 13 (1869)	8
<i>Sachs v. American Surety Co.</i> , 72 App. Div. 60, 63 (1st Dept. 1902) aff'd 177 N.Y. 551	9

<i>Swanson v. United States</i> , 224 F.2d 794 (9th Cir. 1955)	5
<i>United States v. Brizuela</i> , 508 F.2d 386, 387 n. 2 (9th Cir. 1974)	5
<i>United States v. D'Anna</i> , 487 F.2d 899, 900 (6th Cir. 1973)	5
<i>United States v. Egan</i> , 394 F.2d 266, 267-68 (2d Cir. 1968)	8
<i>United States v. Gonware</i> , 415 F.2d 82, 83 (9th Cir. 1969)	5
<i>United States v. Graner</i> , 155 F. 679, 680-81 (2d Cir. 1907)	8
<i>United States v. Jackson</i> , 465 F.2d 964 (10th Cir. 1972)	5
<i>United States v. Kirkman</i> , 426 F.2d 747, 752 (4th Cir. 1970)	5
<i>United States v. Miller</i> , 539 F.2d 445 (5th Cir. 1976)	5
<i>United States v. Wray</i> , 389 F. Supp. 1186, 1190 (D.C.W.D. Mo. 1975)	5
<i>United States Bonding Insurance Company v. United States</i> , 404 US 938	5
<i>Williams v. United States</i> , 444 F.2d 742, 744 (10th Cir. 1971)	5

STATUTES CITED

18 USC §3141	5
24 A.L.R. Fed. 580, 602	5



**UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA

Appellee,

-v-

ANTHONY CATINO, THERESA PEDUTO,
MARY MARICCIO, and JERRY DE FEO,

Appellants-Indemnitors,

-and-

ALFRED CATINO,

Defendant

*On Appeal from the United States District Court
for the Southern District of New York*

APPELLANTS-INDEMNITORS' BRIEF

STATEMENT OF ISSUES

1. Whether the District Court's continuance of Catino's bail bond through the appellate process without the consent of either the surety or the indemnitors constituted a material modification of the terms of the bail contract thereby exonerating the surety.

2. Whether the District Court erred in excluding the surety's offer of proof as to the practice in the Southern

District of New York pertaining to the writing of appeal bonds on the ground that such proof was only admissible where the contract was ambiguous and that there was no such ambiguity present in this bail bond.

PRELIMINARY STATEMENT

This is an appeal from an order of the U.S. District Court, S.D.N.Y. (Pollack, J.) dated March 9, 1977 granting the government's motion for a judgment of forfeiture of the surety bond written on behalf of Alfred Catino in the amount of \$50,000.

STATEMENT OF FACTS

Alfred Catino was indicted on September 20, 1973. Upon arraignment, his bail was fixed at \$50,000 and he was subsequently released from custody when appellant, Public Service Mutual Insurance Company posted its surety bond in the amount of \$50,000. Said bond is dated September 28, 1973.

Catino was tried and convicted by a jury on January 8, 1974 and sentenced on February 26, 1974 to two concurrent twelve year prison terms to be followed by a six year term of special parole.

On February 26, 1974, at the time of sentencing, Catino's attorney requested bail pending appeal (24a)*. After hearing counsel on behalf of Catino the Court stated:

Bail of \$50,000 is continued pending appeal on the basis the defendant will proceed promptly. (26a)

Catino remained at liberty on this bond during his appeal. The Second Circuit affirmed the conviction and the government obtained an order for Catino's surrender on

* References are to appellants' joint appendix. See also (47a).

March 17, 1975. Catino did not comply and he remains a fugitive.*

By a motion made returnable on February 28, 1977, the government moved for a judgment of forfeiture on the surety bond. After reading the papers filed by the surety and the indemnitors and after hearing oral argument, the District Court in a decision and order dated March 9, 1977, granted the government a judgment of forfeiture.

Timely notices of appeal were filed by the surety and the indemnitors.

ARGUMENT

POINT I

THE CONTINUING OF THE DISTRICT COURT BOND THROUGH THE APPELLATE PROCESS WITHOUT THE CONSENT OF THE SURETY CONSTITUTED A MATERIAL MODIFICATION OF THE SURETY CONTRACT AND EXONERATED THE SURETY'S OBLIGATION.

On September 28, 1973 Public Service Mutual Insurance Company** posted a \$50,000 bond for the release of Alfred Catino. By its terms, the bond relates solely to the proceedings before the District Court. The heading of the bond clearly shows that it is a District Court bond and each provision of the bond relates to appearances before the District Court. The precise language of the bond which is most pertinent is:

... that the defendant is to abide any judgment entered in such matter by surrendering himself to

* Catino is presently in French custody on a charge of violating French law.

** Hereinafter referred to as Public Service.

serve any sentence imposed and obeying any order or direction in connection with such judgment as the court imposing it may prescribe (6a)

The terms of this surety bond covered only the proceedings in the District Court and the District Court could not unilaterally modify its terms by extending it to cover the appellate process as well.

The District Court, in granting the judgment of forfeiture, disregarded the bond as a whole and instead focused solely upon the final sentence of the contract:

It is agreed and understood that this is a continuing bond which shall continue in full force and effect until such time as the undersigned are duly exonerated.

It is respectfully submitted that the interpretation given the bond by the District Court that the bond could unilaterally be "continued" by the Court to encompass Catino's appeal, was improperly based upon reading the language above in isolation and entirely out of context.

The District Court, relying on the phrase "continuing bond" found that there was no ambiguity in language of the bond and further that the continuation of the bond through the appeal did not constitute a modification of the surety contract. Appellants agree that there is no ambiguity in the language of the bond, but it is submitted that the language of the bond contemplates only the proceedings in District Court and that the phrase "continuing bond" does not mean that the bond continues until the District Court formally exonerates bail. The District Court's interpretation would permit a trial bond to be continued at the whim of the Court through appeal, through a petition for certiorari, through any remands or any other judicial proceeding no matter in what court such proceedings occur. Such an interpretation is not warranted by the language of the contract.

A bail bond is an enforceable contract* between the principal, surety and government to insure the presence of an accused whenever required by the court during a criminal proceeding. *United States v. D'Anna*, 487 F.2d 899, 900 (6th Cir. 1973); *Williams v. United States*, 444 F.2d 742, 744 (10th Cir. 1971), *cert. den. sub nom.*, *United States Bonding Insurance Co. v. United States*, 404 U.S. 938; *United States v. Jackson*, 465 F.2d 964 (10th Cir. 1972); *United States v. Wray*, 389 F. Supp. 1186, 1190 (D.C.W.D. Mo. 1975).

Under federal law, a trial bond and an appeal bond are treated as different instruments serving different purposes. *United States v. Brizuela*, 508 F.2d 386, 387 n. 2 (9th Cir. 1974); See *United States v. Kirkman*, 426 F.2d 747, 752 (4th Cir. 1970). See also 8 C.J.S. §79(c).

A surety bond is to be strictly construed in accordance with its own terms and like any other contract it should be construed to give effect to the reasonable intentions of the parties. *United States v. Wray*, *supra* at 1190 (and cases cited therein).

Moreover, in construing the contract, it must be remembered that:

* In determining the scope of a surety's liability and, in turn, the propriety of a forfeiture, a substantial body of cases holds that the contract must be interpreted in light of the applicable law of the state in which the contract was made. *United States v. D'Anna*, *supra*; *United States v. Gonware*, 415 F.2d 82, 83 (9th Cir. 1969); *Swanson v. United States*, 224 F.2d 794 (9th Cir. 1955); *Palermo v. United States*, 61 F.2d 138, 140 (8th Cir. 1932) *cert. den.* 288 U.S. 600 (1933).

This court has not spoken to the issue of which law, federal or state, applies to a surety contract. Since the government is a party to the contract, a strong argument can be made that federal law applies. Moreover, in light of the passage of Rule 46 F.R.Cr.P. and the Bail Reform Act of 1966, 18 U.S.C. §3141 et. seq., it would appear that federal law should apply. *United States v. Miller*, 539 F.2d 445 (5th Cir. 1976). See 24 A.L.R. Fed. 580, 602. However, in this case, which law applies is not critical, for under either the result is the same. For purposes of the brief, the body of the text will discuss the issues solely in terms of Federal law.

... the terms of a contract should be interpreted as a whole, and not out of context of all the other terms ...

Martin v. Victor Co. Inc., 498 F.2d 16, 23 (1st Cir. 1974); *Pan American Realty Trust v. Twenty One Kings Inc.*, 408 F.2d 937, 939 (3rd Cir. 1969); *Northwestern Industrial Piping, Inc.*, 467 F.2d 1308, 1312 (Ct. of Claims 1972); *Container Transport International Inc. v. United States*, 437 F.2d 1365, 1370 (Ct. of Claims 1971).

Interpreting this bond as a whole, it is absolutely clear that it did not contemplate holding the surety responsible for securing the presence of Catino after his appeal had been concluded. The case law on the subject supports this view. In fact, the very case, *United States v. Miller*, 539 F.2d 445 (5th Cir. 1976), relied upon so heavily by the District Court supports appellants' view.

It is correct that "... there is no *per se* federal rule that the pronouncement of sentence exonerates a surety '*United State v. Miller*, ...' (51a), and the indemnitors do not suggest there is such a rule. But, to say there is no such rule does not lead to the conclusion that a District Court trial bond continues, in the discretion of the court, through the appeal. Actually, just the opposite is so.

In *Miller*, the court dealt with a bond containing similar language to that employed here.

It is agreed and understood that this is a continuing bond which shall continue in full force and effect until such time as the undersigned are duly exonerated.

Id. at 447 N.3.

What is interesting to note, is that the Court in *Miller* in construing the surety contract stated:

In short, we conclude that there is no *per se* federal rule that the pronouncement of sentence

exonerates a surety. *Rather, we hold that an appearance bond may be extended to cover reasonably brief postponements of the execution of sentence.*

Id at 449.* (emphasis supplied)

The use of the words "reasonably brief" by the *Miller* court is most significant, for if the "continuing bond" language is correctly interpreted by the District Court, the court in *Miller* would not have to condition the propriety of the postponement of the execution of sentence upon such a postponement being "reasonably brief".

Miller, and cases dealing with the same issue, *United States v. Gonware*, 415 F.2d 82 (9th Cir. 1969), *United States v. Wray*, 380 F.Supp. 1186 (W.D. Mo. 1975) have all reached the same conclusion, namely that the mere pronouncement of sentence does not exonerate a surety and that the surety can be held responsible for short postponements in execution of sentence. No case found by the District Court or by counsel has ever held that extending a bond through appeal was included in the meaning of the bond or within a "reasonably brief" postponement of the execution of sentence.

Here the continuance of bond was a material modification of the terms of the contract.

As with any other contract, one party to a surety contract may not unilaterally modify the terms of the contract. See 8 C.J.S. Bail §79(b). It is appropriate at this point, to distinguish between the power of the court to modify the terms under which the defendant may be released and the power of the court to modify the surety contract to conform to such release modifications. A court can change the terms of release but it may not compel comparable changes in the

* The District Court, omitted the emphasized portion of *Miller* in its opinion. (51a).

surety contract in the absence of the consent of the surety.*

Regardless of who the movant may be, *if the court orders a material modification of the terms of the bond, the defendant must immediately post a new, properly executed bond, or a rider similarly executed for attachment to the old bond, containing the amended conditions. If such an instrument is not filed forthwith, the court must order the defendant held in custody of the Attorney General until such bond is furnished.*

United States v. Egan, 394 F.2d 266, 267-68. (2d Cir. 1968) (emphasis supplied).**

Moreover, it is patently obvious that the conversion of the trial bond into an appeal bond was a material alteration. After sentence, the risk of flight is substantially increased, "a risk clearly not contemplated at the time of the execution of the . . . bond." *United States v. D'Anna*, *supra* at 901, and the duration of the surety contract is substantially extended beyond the period of time contemplated by the parties. An increase in risk and in the duration of that risk is a material alteration of the contract.

The failure of the Court to comply with the requirement set out in *Egan*, that any material modification requires a new bond or a rider to the old bond, renders the bond null and void. See, 8 C.J.S. Bail §43. The failure to rewrite this bond was not merely an irregularity, but went to the very validity of the bond, for as the Court stated in *Egan*, the failure to file such a rewritten or an amended bond subjects

* See, *Reese v. United States*, 76 U.S. 13 (1869); *United States v. Graner*, 155 F.679, 680-81 (2d Cir. 1907); 24 ALR Fed. 580 *et seq.*

** In *Egan*, an accused moved for a modification relating to the frequency of his reporting to the marshal. The motion was granted so that the accused would have to report once every ten days instead of every day. The court held that this change was within a provision of the bond and was contemplated by all the parties to the contract.

the defendant to immediate arrest or surrender. *Id.* at 268. Being subject to immediate arrest, Catino gained no benefit from the bond, rendering it void. See, *People v. Wirtshafter*, 305 N.Y. 515, 522 (1953) (Appeal bond illegally granted to a second felony offender).*

* Under New York Law the result would be the same.

Under New York Law, a contract of suretyship is construed in accordance with the same rules applicable to the interpretation of any written instrument. If there is any ambiguity it is resolved in favor of the surety. *People v. Henry*, 33 A.D. 2d 1031 (2d Dept. 1970), *Sachs v. American Surety Co.*, 72 App. Div. 60, 63 (1st Dept. 1902) *aff'd* 177 N.Y. 551; *Gamble v. Cuneo*, 21 App. Div. 413 (1st Dept. 1897) *aff'd* 162 N.Y. 634; *People v. Public Service Mutual Insurance Co.*, 39 Misc. 2d 488 (Sup. Ct. Kings Co. 1963). Further, the contract is to be construed as a whole to ascertain and give effect to the intention of the parties. *People v. Torn*, 220 App. Div. 676 (1st Dept. 1906); *People v. Public Service Mutual Insurance Co.*, *supra*.

The New York cases which have applied these rules have not done so in the context of a bond pending appeal, rather the usual circumstance is where the defendant presents himself for sentence and is sentenced, but the court grants him time to a date certain to pay a fine or set his affairs in order. Compare, e.g. *People v. Bowles*, 280 App. Div. 476 (4th Dept 1952), *People v. Public Service Mutual Insurance Company*, 49 Misc. 2d 875 (Sup. Ct. Part I, Spec. Ref. 1966) and *People v. Public Service Mutual Insurance Company*, 40 Misc 2d 341 (Sup. Ct. Kings Co. 1963) with *People v. Public Service Mutual Insurance Company*, 39 Misc 2d 488 (Sup. Ct. Kings Co. 1963).

These cases are somewhat in conflict and it may be the law of New York that a surety is not discharged when sentence is pronounced if execution of the sentence is stayed to a date certain. However, research reveals no New York case even intimating that a surety for appearance for trial extends through the appellate process. A probable reason why this issue has not arisen is that no one has even thought that a surety on a trial bond extended through an appeal.

Thus, under New York law the surety contract here involved contemplated only the proceedings in the trial court. The attempt to convert this trial bond into an appeal bond was an impermissible unilateral modification of the terms of the contract, terminating the surety's financial responsibility. See *People v. Henry*, 33AD 2d 1031, (2d Dept. 1970); *People v. Zager*, 57 N.Y.S.2d 881, 884 (Sup. Ct. Kings Co. 1945) (Elimination of one surety after bail bond executed); Cf. *Becker v. Faber*, 280 N.Y. 146 (1939).

POINT II**THE FAILURE OF THE DISTRICT COURT TO
ACCEPT THE SURETY'S OFFER OF PROOF
AS TO THE PRACTICE IN THE DISTRICT
WAS ERROR.**

The attorney for Public Service made an offer of proof via the proposed testimony of a deputy clerk of the District Court, Mr. Eddie Aponte, to the effect that a trial bond and an appeal bond are separate and distinct bonds and that an appeal bond must be executed by the District Court clerk's office before a defendant-appellant can be admitted to bail. The District Court refused this offer based upon its conclusion that there was no ambiguity in this bond. Suffice it to say, the very cases relied upon by the District Court, which all dealt with a much lesser extension of a bail bond than present here, all refer to the practice in the district to determine the intentions of the parties.

In *Miller** the Court cited *United States v. Gonware, supra* and stated:

* It must be remembered that the bond in *Miller* used the same "continuing bond" language used in the bond at issue here.

Moreover, in attempting to divine what the parties meant by the language they used, we agree with the observation of the Ninth Circuit that

"... it is a common practice in the federal courts as well as the state courts, for defendants to request and for courts to grant short stays of execution of sentence to allow defendants to put their affairs in order before they start to serve their sentence. Even a bail bond broker would not expect the defendant to pay for an additional bond during

[a short, reasonable] stay of execution. Given this widespread practice, it is reasonable that the parties to this bail bond intended that the surety would remain liable during a reasonable stay of execution of the sentence."

539 F.2d at 448. Also, *United States v. Wray supra* at 1191.

If these cases found it necessary to look to the practice in the jurisdiction to interpret a surety contract as to the issue of whether it covered a short stay in the execution of sentence, surely the District Court here was required to accept the surety's offer of proof.

POINT III

PURSUANT TO RULE 28(i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE, APPELLANTS INCORPORATE AND ADOPT ALL APPLICABLE ARGUMENTS RAISED BY CO-APPELLANT.

CONCLUSION

THE JUDGMENT SHOULD BE REVERSED, THE FORFEITURE SET ASIDE AND THE FUNDS RETURNED TO THE SURETY, OR IN THE ALTERNATIVE, THE CASE SHOULD BE REMANDED FOR A HEARING ON THE PRACTICE IN THIS DISTRICT WITH REGARD TO TRIAL AND APPEAL BONDS.

Respectfully submitted,

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ROSNER

STATE OF NEW YORK)
 : SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 29 day of April 1977 deponent served the within Brief upon

U.S. Atty. So. Dist. of N.Y.

attorney(s) for
Appellee

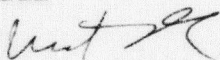
In this action, at

1 St. Andrews Pla, NYC

the address(es) designated by said attorney(s) for that purpose by depositing
3 copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.


ROBERT BAILEY

Sworn to before me this 29 day
April, 1977



WILLIAM BAILEY

Notary Public, State of New York
No. 43402545
Qualified in Richmond County
Commission Expires March 30, 1978

